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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 344

GEORGE G. KILARJIAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF PETITIONER IN REPLY

Respondent's opposition contends that the NATO-SOFA agreement precluded by Congressional assent the filing of Petitioner's counterclaim (Gov't Brief in Opp., p.1); and, that the said agreement vests exclusive jurisdiction over wrongful death maritime claims against the United States in a NATO host State in order to promote uniform treatment of compensation claims. (Gov't Brief in Opp., p.2)

Respondent assumes what cannot be proven; namely, that there is any affirmative indication by Congress of an intent to preclude the judicial allowance of a remedy for wrongful death under the Public Vessels Act to individuals in the situation of this petitioner.

Respondent by failing to answer must be deemed to have conceded that the framers of the NATO-SOFA AGREEMENT rejected the inclusion of third-party maritime claims within the purview of said AGREEMENT (par. 2, p. 14 of Pet.); and, that under the regulations implementing the Foreign Claims Act title 10 U.S.C., Sec. 2734 (a), as specified in title 32 C.F.R., Sec. 842.68 (a) (2) and Sec. 842.92 Rule 2 Note 2, personal injury and wrongful death claims against the United States arising in NATO countries may be subject to suit under the Public Vessels Act. (p.15 - 16 of Pet.)

The Public Vessels Act provides a remedy for wrongful death caused by the breach of a maritime duty imposed by Congress pursuant to federal maritime law. Established Congressional policy favors recovery in such cases in the absence of an affirmative legislative direction to except a particular class of cases. No exception, as claimed by Respondent, depriving wrongful death claimants of a remedy provided generally to all classes alike, is contained in any Congressional enactment or pronouncement of policy. It may not be presumed that Congress has ceded or surrendered the exclusive jurisdiction of the federal courts to foreign tribunals in suits such as brought by the Petitioner herein.

The Petitioner has been forclosed from pursuing her statutory remedy as provided by Congress; and, has also been deprived of her rights under the principles of general maritime law as enunciated in the recent landmark decision of this Honorable Court in Moragne v. States Marine Lines, Inc., 90

S. Ct. 1772 (1970).

The inequitable denial to maritime wrongful death claimants of remedies generally granted to all classes without exception in Congressional enactments in the maritime domain including the Public Vessels Act, in the absence of affirmative Congressional direction, is without legal basis or precedent and is not compatible with the modern concepts and policies of federal maritime law.

No such affirmative Congressional direction is specified by Respondent, nor does such direction or intent by Congress to single out and preclude the Petitioner from pursuing her remedy for wrongful death in the federal courts exist.

Neither is there any legal basis, either in precedent or policy, of permitting property damage claimants to pursue their remedies under the Public Vessels Act against the Respondent and, at the same time, to deny personal injury and wrongful death claimants, such as the Petitioner herein, the right to pursue their remedy for the identical breach of a maritime duty. This dichotomy is discriminatory, in violation of Congressional enactments clearly indicating just the opposite intent and policy, and, unwarranted in reason and justice.

This Honorable Court has consistently demonstrated a "strong concern for uniformity" in the exercise of admiralty jurisdiction which has been thwarted by the rulings of the lower courts in this proceeding.

The rulings of the lower courts in this proceeding, if permitted to prevail, will produce serious confusion and hardship not only to this Petitioner but to all other third-party maritime claimants for wrongful death. The

withdrawal of consent, as granted under our waiver statutes, from a particular class or group of claimants as here involved, without affirmative Congressional direction or authorization, introduces an unjustifiable anomaly in our jurisprudence which requires correction by this Court and vindication of federal policies; in the interest of uniformity in the exercise jurisdiction, "and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments." Moragne v. States Marine Lines, Inc., supra, page 1789.

The lower court conceded that the compulsory counterclaim might ordinarily be asserted herein (Pet. App. C6-C7). The bar to the assertion of Petitioner's counterclaim is untenable since there exists no affirmative Congressional direction withdrawing federal jurisdiction from suits such as that of the Petitioner arising from the collision of a privately owned vessel with a vessel owned by the Government of the United States.

It is well established that compulsory counterclaims arising from the subject matter of the identical breach of a maritime duty, as in the case of the collision herein, may be asserted regardless of jurisdiction over such counterclaim, when the United States sues in admiralty, whether or not there has been a statutory waiver of sovereign immunity. 3 J. Moore, Federal Practice paragraph 13.27, at 72-73 (2d ed. 1968).

Respondent should not be permitted to make a compensation case out of a third-party maritime claim. The erroneous holdings of the Courts below, based upon Respondents untenable contention, contravene the intent and mandate of Congress by unjustifiably foreclosing Petitioner's remedy for wrongful death and the District Court's exclusive

jurisdiction thereof, contrary to the express provisions of the Public Vessels Act and by usurping, as it were, this Honorable Court's historic responsibility for fashioning the controlling rules of admiralty law; thus, establishing irrational distinctions and anomalies in each instance hazardous to and incompatible with the general Congressional policies respecting maritime legislation to the extent that this Honorable Court's supervision and inquiry is clearly required in the spirit of its' decision in the Moragne case, supra as recently as June 15, 1970.

Respectfully submitted.

Francis J. Nicosia

Attorney for Petitioner

August 10, 1970

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 344

GEORGE G. KILARJIAN, et al.

Petitioner,

-against-

UNITED STATES OF AMERICA, as owner of the USNS BLUE JACKET,

Respondent.

ON PETITION TO REHEAR PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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